WONG KON SANG v. CHANG LITHO PRESS LTD.

[O.C.J. (Ismail Khan J.) July 17, 1968]
[Seremban — Originating Motion No. 40 of 1967]

Practice and Procedure — Sessions court — Jurisdiction of — Parties submitting to jurisdiction though counterclaim exceeding value limit of jurisdiction — Whether sessions court can hear case — "Action" — Whether includes counterclaim.

Practice and Procedure — Parties submitting to jurisdiction although counterclaim exceeded value limit of jurisdiction — Sessions court refusing to hear case on the ground that it had no jurisdiction — Interpretation of ss. 65 and 66 of the Courts Ordinance, 1948.

This was an application by way of motion to have an action before the sessions court transferred to the High Court. The respondent claimed the sum of $1,881.70 in the sessions court being a sum due in respect of certain printing services rendered by the respondent to the applicant. The applicant denied liability and alleged in his defence bad workmanship on the part of the respondent in performing those services as a result of which he suffered loss. The applicant counterclaimed $4,227.50 by way of special and general damages.

Subsequently the applicant and the respondent entered into an agreement under section 65(2) of the Courts Ordinance whereby they agreed that in "consideration of the action being disposed off by this court the parties hereby agree that the sessions court shall have jurisdiction to try this action although the amount of the subject matter of the alleged counterclaim exceeds the value limit of jurisdiction". The learned president of the sessions court held that he had no jurisdiction to hear the counterclaim. He then made an order staying the action pending an application for the transfer thereof to the High Court. In this application the applicant asked for an order under section 66(1) of the said Ordinance that the above action be transferred to the High Court and proceeded with as if such action or suit had been originally instituted in the High Court because it involves difficult questions of fact and law.

Held, dismissing the application: (1) section 65(2) of the Courts Ordinance applies to the whole action and to all the issues to be tried in the action and to everything in the counterclaim. The president of the sessions court therefore had jurisdiction to hear the case;

(2) as the learned president had held that he had no jurisdiction to hear the case it will be necessary for the respondent to apply to the court for an order of *mandamus* for the case to go back to the sessions court to be heard.

Case referred to:—

(1) *Kinnaird* v. *Field* [1905] 2Ch.306.

ORIGINATING MOTION.

N. Ramachandran for the applicant.

Atma Singh Gill for the respondent.

Cur. Adv. Vult.

Ismail Khan J.: In Civil Action No. 30 of 1966 filed in the Sessions Court, Seremban the plaintiff, (the respondent in this application), claimed a sum of $1,881.70 from the defendant (the applicant herein) being a sum due in respect of certain printing services rendered to the applicant. The applicant denied liability. In his defence he alleged bad workmanship on the part of the respondent in performance of the said services, as a result whereof he alleged that he had suffered loss. He therefore counterclaimed a sum of $4,227.50 by way of special damages and general damages.

On 16th February, 1967, the applicant and the respondent entered into an agreement under section 65(2) of the Courts Ordinance, 1948, which provided, *inter alia*:—

"That in consideration of this action listed as No. 30 of 1966 in the sessions court at Seremban being disposed off by this court, the parties hereby agree that the sessions court at Seremban shall have jurisdiction to try this action although the amount of the subject matter of the alleged counterclaim of the second party exceeds the value limit of jurisdiction."

The learned president ruled that he had no jurisdiction to hear the counterclaim. He made an order staying the action pending an application for the transfer thereof to the High Court.

In this application by way of motion, the applicant asks for an order under section 66(1) of the Courts Ordinance that the above action of the sessions court be transferred to the High Court and proceeded with as if such action or suit had been originally instituted therein.

The ground for the application is that the case raises the question of the quality of the respondent's workmanship which would involve difficult questions of law and fact.

Under section 65(1) of the Ordinance, the sessions court has jurisdiction in civil suits where the amount in dispute or value of the subject-matter does not exceed $2,000, but if the parties agree in writing under section 65(2) that the sessions court shall have jurisdiction to try such action or suit, the sessions court shall have jurisdiction to try the same, although the amount of the subject-matter may exceed the value limit of its jurisdiction. On the filing of such agreement in the sessions court, the parties shall be subject to its jurisdiction.

It was contended by counsel for the applicant that the word "action" in section 65(2) does not include a counterclaim and that therefore the agreement is of no effect if it purports to give the sessions court jurisdiction to try the counterclaim when the subject-matter exceeds the value limit of its jurisdiction. In this case it was said the special damage claimed was over $2,000 and there was also the question of general damages. He relied on the case of *Kennaird* v. *Field.*[1] That case has no application. If at all, it would appear to be against the applicant's contention. In that case it was held that a defendant who counterclaimed to an action in the Chancery Division could not by the mere fact of tacking on to his counterclaim a claim for libel successfully assert a right to deprive the plaintiff of the privilege of having

the action tried without a jury and insist upon the right of having the whole action tried by judge and jury.

It is true that section 65(2) speaks only of action, and not counterclaim, but the defendant cannot by counterclaiming for an amount which exceeds the value limit of the jurisdiction of the sessions court deprive the plaintiff of his right under the agreement made pursuant to the subsection to have all the issues tried by that court. In my view, section 65(2) applies to the whole action and to all the issues to be tried in the action and to everything in the counterclaim. To my mind, this view is supported by the wording of section 66(1). Under this subsection, even if the counterclaim involves matters beyond the jurisdiction of the court it could still dispose of the whole matter in controversy so far as it relates to the demand of the plaintiff and any defence thereto. The only qualification is that it has no jurisdiction to award a relief in excess of that which it has jurisdiction to award. It would have such jurisdiction only with the consent of the parties in writing.

It seems to me that section 65(2) contemplates only sections in respect of money claims or common law actions, and is not to be construed as conferring a general power to enlarge jurisdiction by consent. The parties cannot therefore by entering into a formal agreement under section 65(2) give the sessions court jurisdiction in actions, suits or proceedings relating to matters set out in section 69 of the Ordinance.

In the present case the action does not come within the categories set out in section 69. The learned president therefore had jurisdiction in view of the agreement in writing entered into between the parties under section 65(2). As he had held otherwise, it will be necessary for the respondent to apply to the court for an order of *mandamus* for the case to go back to the sessions court to be heard

This application is dismissed, but as it was made at the suggestion of the learned president, each party will bear his own costs.

Application dismissed.

Solicitors: *N. Ramachandran; Atma Singh Gill & Co.*

RE LIM LENG CHEAK, DECD.; LIM EOW THOON v. LIM KENG CHUAN & ANOR.

[O.C.J. (Ong Hock Sim J.) July 20, 1968]
[Penang — Originating Summons No. 14 of 1968]

Trusts and Trustees — Whether there was impossibility of performance.

Evidence — Estoppel — Consent order — Res judicata.

The plaintiff applied for a construction of an indenture dated September 17, 1930 and for a declaration that the trusts comprised in the said indenture had become impossible of performance as only part of the property referred to in the indenture was permitted to be used as a burial ground and consequently a resulting trust of the lands referred to in the said indenture arose in favour of the plaintiff.

A similar application was made before another judge in 1965 following the compulsory acquisition of four other pieces of land by the State government. The judge did not accept there was a resulting trust and on appeal to the Federal Court a consent order was made. It was now claimed by the plaintiff that the judgment of the trial judge was varied by the Federal Court. The defendants asserted that the plaintiff was estopped from raising the matter as the same had finally been resolved by the trial judge.

Held: the trusts created by the indenture subsisted and there was no resulting trust in favour of the plaintiff. Costs to be borne by the plaintiff personally.

ORIGINATING SUMMONS.

Ong Huck Lim for the plaintiff.

C. O. Lim for the defendants.

Cur. Adv. Vult.

Ong Hock Sim J.: The plaintiff applies for a construction of an indenture dated the 17th September 1930 and for a declaration that the trusts comprised in the said indenture have become impossible of performance and consequently a resulting trust of the above said lands arises in favour of the plaintiff. The ground for this application rests on the evidence of the Collector of Land Revenue, Penang and his letter dated 23rd September, 1966 that only part of Lot 140(1) Mk. 18, N.E.D. Penang will be permitted to be used as a burial ground. The plaintiff claims therefore there is a failure of the trust in respect of the other lands.

A similar application was made before Hepworth J. in 1965 following the compulsory acquisition of four lots by the State Government. The learned judge then did not accept the plaintiff's contention that since it is no longer possible for the lands acquired to be used as a burial ground there is a resulting trust to the plaintiff of the proceeds of the sale. The order is now set out:—

"This action coming on for trial on the 5th and 6th days of April 1965 before this court in the presence of counsel for the plaintiff for the 1st, 2nd and 3rd defendants and for the 4th, 7th and 8th defendants and upon reading the pleadings and upon hearing counsel as aforesaid IT WAS ORDERED that this action should stand for judgment and this action standing for judgment this day in the presence of counsel for the plaintiff, for the 1st, 2nd and 3rd defendants and for the 4th, 7th and 8th defendants THIS COURT DOTH ORDER that the said action be and is hereby dismissed AND THE COURT DOTH ORDER AND DECLARE as to prayer 1 of the counterclaim of the 1st, 2nd and 3rd defendants that the trust for a burial ground for the family of Lim Leng Cheak in terms of the indenture dated the 17th day of September 1930 (Registered No. 80 Volume 691) and made between Tan Say Seang Neoh of the 1st part, Lim Eow Thoon